UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc. and Victoria Operating Co., a single employer, Employer, and Theatrical Stage Employees Union, Local 2, I.A.T.S.E., Charging Party.	Case No. 13-CA-186575

CHARGING PARTY'S POSITION STATEMENT ON REMAND FROM THE SEVENTH CIRCUIT

As requested in the Board's letter dated September 18, 2018, Charging Party Theatrical Stage Employees Union, Local No. 2, I.A.T.S.E., ("Union") respectfully submits this statement of position with respect to the issues raised by the remand of this matter to the Board from the United States Court of Appeals for the Seventh Circuit.

The Union urges the Board on remand to honor the Seventh Circuit's decision while simultaneously considering and protecting on remand its own institutional interest in maintaining a viable and efficient procedure for investigating and processing future election objections raised both by unions and by employers. The Board defended this interest before the Seventh Circuit, and the court's decision essentially does not address it, so it remains a valid and important consideration. As argued briefly below, the Union respectfully requests that, on remand, before putting the parties through the time and expense of a hearing, the Board direct the Regional Director to investigate those claims that Jam raises in its "offer of proof" but supports only with speculation, taking the steps that the court faulted the Regional Director for skipping, such as reviewing the Union's relevant

referral records and interviewing Justin Huffman. If this evidence supported Jam's speculative offer of proof, then Jam would have satisfied its burden, and a hearing should be held.

BACKGROUND

In September 2015, Theatrical Stage Employees Union Local 2, IATSE (the "Union"), filed a petition with Region 13 seeking to represent a group of stagehands working at three concert venues in Chicago: the Riviera Theatre, Park West, and the Vic Theater. (GC MSJ Ex. 1.) The stagehands at these venues are employed by four entities operating as a single employer: Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co. (collectively, "Jam" or the "Employer"). They work on an on-call basis, only when there is a concert or show at one of the theaters; their job is to unload equipment and stage elements from a band's trucks, set it up in the venue, operate it during the show, and then disassemble and load it back into the trucks after the concert.

The day before the Union filed its petition, Jam fired the entire stage crew at the Riviera, a move that drew an unfair labor practice charge from the Union (filed the day after the petition) alleging that the crew's union activity had motivated Jam to fire them all. (GC MSJ Ex. 11-4). The Board suspended processing the petition while investigating the unfair labor practice charges.

In April 2016 the NLRB and Jam settled the unfair labor practice case. Their settlement required Jam to offer the fired employees

> immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015, or if

those jobs no longer exist, to substantially equivalent positions, without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.[1]

On May 16, 2016, Region 13 conducted the election. (GC MSJ Ex. 17.) Twenty-two employees cast ballots in favor of representation by the Union, while ten voted against; an additional twenty-one ballots were challenged and segregated from tallied ballots. (GC MSJ Ex. 17.) Both parties challenged certain ballots; the Regional Director sustained some of the challenges and declined to rule on others because they were no longer sufficient in number to affect the outcome. The Seventh Circuit sustained the Board's affirmation of the Regional Director's ruling on the challenged ballots, and that issue is not before the Board on remand. *Jam Prods., Ltd. v. NLRB*, 893 F.3d 1037, 1047 (7th Cir. 2018).

Jam also filed a timely objection to the conduct of the election, alleging that the Union had conferred a benefit on potential voters by "offering and providing premium work at Union venues, to which they were otherwise not entitled." (GC MSJ Ex. 18.) In support of its objections, Jam submitted a written offer of proof summarizing the testimony it expected certain individuals to provide, attaching what it claimed were screenshots of text messages from certain bargaining-unit members referring to having work with other Union employers, and an email to the Union's counsel requesting that he voluntarily turn over a trove of documents for Jam to search through for material that might bolster its case. (GC MSJ Ex. 19-2.) Specifically, the offer of proof states Jam's expectation that pro-

[1] The Union filed a new charge over Jam's implementation of the settlement, and the settlement has since been rescinded by an Administrative Law Judge on the ground that there was a failure of the parties to reach a meeting of the minds. *Jam Prods., Ltd.*, 2017 NLRB LEXIS 285 (ALJ Dec. May 26, 2017). The ALJ remanded the case to the Division of Judges for a hearing. *Id.* His decision remains under review by the Board.

duction manager Behrad Emami would testify that in early April 2016 various bargaining-unit members turned down certain work opportunities with Jam because of conflicts with scheduled work with other Union employers, but that these same individuals were not on the payroll at any of three concerts produced by Jam at the United Center, a Union venue, in January 2016. (GC MSJ Ex. 19 at 3-4.) It also claims Jam expected its employee Eric Linz to testify that he saw six bargaining-unit members working at another Union venue on April 5. (GC MSJ Ex. 19 at 4.) It further asserts that it was "common knowledge" that bargaining-unit member Justin Huffman "has been in regular contact with Local 2 since the inception of the organizing campaign," and that Huffman was "expected to testify that he helped facilitate getting Local 2 work for" members of the bargaining unit. (GC MSJ Ex. 19 at 4.) Finally, Jam contends that it's possible the Union's records and the testimony of the rest of the bargaining unit might show a significant increase in referrals for work by the Union during the "critical period" just before the election. (GC MSJ Ex. 19 at 5.) The Regional Director found that Jam's offer of proof was "insufficient to raise substantial and material factual issues that would constitute grounds for setting aside the election if introduced at hearing," (GC MSJ Ex. 23 at 8), and overruled Jam's objection without a hearing. (*Id*.)

Jam requested review of the Regional Director's ruling, (MSJ GC Ex. 25), which request the Board denied on January 5, 2017. (MSJ GC Ex. 29.)

Meanwhile, the Union requested bargaining with Jam on at least five occasions: June 20, July 21, and September 22, 2016, and January 9 and 16, 2017. (MSJ GC Ex. 30-33.) Jam, seeking to "test" the NLRB's certification, refused to bargain, and the Union filed an

unfair labor practice charge. (MSJ GC Ex. 34.) On the General Counsel's motion for summary judgment, the Board found a violation of Section 8(a)(5) of the Act and directed Jam to recognize and bargain with the Union. Jam sought review of this order of the Board—together with the Board's certification of the Union—in the U.S. Court of Appeals for the Seventh Circuit.

The Seventh Circuit denied the Board's application for enforcement and granted Jam's petition for review, remanding "for a hearing on [Jam's] election objection." *Jam Prods.*, 893 F.3d at 1047. The court rejected the argument that Jam's "offer of proof" relied *solely* on wild speculation as to what the Union's records would show or what Justin Huffman—one of the employees it fired and whom it claims to know was in regular contact with the Union since the organizing campaign began—might say if called to testify, and that Jam had mischaracterized and made sweeping generalizations from its records of who worked at a handful of shows it produced at one Union venue in the winter and anecdotal evidence of its reinstated employees working at Union venues in the spring. In short, the court found that this speculative, sketchy evidence was the best that Jam could ever have been expected to produce, given its inherent lack of access to the Union's records, and therefore that it raised a "'substantial and material factual issue' sufficient to warrant an evidentiary hearing" and that "the Regional Director thus abused his discretion by failing to investigate or hold such a hearing." *Jam Prods.*, 893 F.3d at 1046.

UNION'S POSITION ON REMAND

On remand, the Board should direct the Regional Director to investigate the allegations in Jam's "offer of proof" that it could not support with evidence to which it lacked access, taking the steps that the Seventh Circuit indicated should have been taken before

overruling Jam's objections, such as reviewing the Union's relevant referral records and interviewing Justin Huffman. If this evidence supported Jam's offer of proof, then Jam would have satisfied its burden, and a hearing should be held. If it does not, then the Regional Director's initial assessment that Jam had failed to make a sufficient showing to warrant a hearing will have been demonstrated to be correct.

This procedure is consistent with the court's opinion. In the summary concluding lines of the opinion the court remanded the case for "for a hearing on [Jam's] election objection." But in the opinion itself, the court held that the Regional Director had abused his direction by "failing to *investigate or* hold such a hearing," (emphasis added), noting that he had "declined to interview any of the individuals identified in the offer of proof or require Local No. 2 to turn over any business records." *Jam Prods.*, 893 F.3d at 1044. Ultimately, then, the court faulted the Regional Director not necessarily for declining to schedule an immediate hearing, but for failing to take any substantive investigative steps to look into Jam's allegations. Even though many of the allegations in Jam's offer of proof were unsupported by any actual evidence, such as the speculation about what Justin Huffman might say in a hearing or what the Union's referral records might show, the court believed that the evidence that Jam was able to marshal, such as its own employment records and information from employees like Behrad Emami and Eric Linz, was sufficient to require an investigation into its more speculative claims, as well.

In such a case, where an objecting union or employer cannot present additional evidence that it has reason to suspect the other side possesses but lacks access to—such as the testimony of a supervisor or union official, or the employer's personnel records or communications with a union avoidance consultant, or the union's referral records—if

the objecting union or employer presents sufficient circumstantial evidence of objectionable conduct to warrant further inquiry, as the court found to be the case in this matter, an investigation by the Regional Director into the speculative, unsupported aspect of the objecting union or employer's claims is a sufficient response in light of the evidence they were able to present.

In the present case, the Board will have complied with the court's directive on remand by remanding the case to the Regional Director to investigate the areas about which Jam could only speculate—what the Union's referral records would show about the frequency of the former Jam employees receiving referrals to work at Union venues in the critical period as compared to the months between their mass termination by Jam and their partial reinstatement, as well as what Justin Huffman might say about "orchestrating" a "scheme" to "steer" jobs to the fired and partially reinstated Riviera employees. That investigation will show whether the purely speculative portion of Jam's "offer of proof" has any basis in reality and actually does raise substantial and material issues for hearing. This course of action would protect the interests the Seventh Circuit recognized: that the losing union or employer does not have access to the other side's records or witnesses, and therefore when it has a strong suspicion that those records or witnesses could corroborate its own weak, circumstantial evidence of objectionable conduct by the employer or union, it is unfair to hold the objecting union or employer to a burden that it cannot sustain because of its inherent lack of access.

At the same time, requiring a preliminary investigation when the objecting party's claim is based on its own weak, circumstantial evidence that it can only speculate is cor-

roborated by the other side's inaccessible records responds to the Board's worry, expressed to the Seventh Circuit, that the losing union or employer in any election surely shoulders a heavier burden to get an evidentiary hearing on its objections than merely saying that it really does think that the employer's/union's records, if only it could have a look at them, and the employer's supervisors/union's supporters, if it only it could cross-examine them, would certainly establish objectionable conduct by the other side. As the Board pointed out to the Seventh Circuit, the objecting party is not "entitled to a hearing just because it wants one, just because it claims that the election was tainted, [or] just because it says it could really pin things down if it were granted a hearing." *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000). The Board's practice "is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections." *Amalgamated Clothing Workers*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)); accord *NLRB v. Nat'l Survey Serv., Inc.*, 361 F.2d 199, 205 (7th Cir. 1966) (need for limitations on the "allowance of a hearing on objections is apparent" due to potential of "protracted delay"). An evidentiary hearing is not meant to afford an objecting party the opportunity to conduct a speculative "fishing expedition." *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978) (finding objecting employer not "entitled to a fishing expedition in order to prove its wholly unsubstantiated assertions," rejecting employer's argument that, "without a hearing and the concomitant opportunity to subpoena and

examine witnesses, it has no effective method of acquiring the evidence the Board demands"). These very real concerns affect unions and employers alike, and nothing in the court's decision requires the Board to abandon them.

In these kinds of cases, a reasonable balance to strike is for the Regional Director to investigate the objecting union or employer's unsubstantiated offer of proof and proceed to a hearing only if the results of that investigation, coupled with the objecting party's own weak circumstantial evidence, do raise a substantial and material issue warranting an evidentiary hearing.

Finally, however the Board handles the case on remand, the Union notes that there is only one issue remaining for decision: whether "Local No. 2 engaged in a concerted effort to steer high-paying union jobs to the twenty-one voting members of the recently reinstated Shaw crew … in the critical period before the election (between April and the first half of May 2016)" that "would have ordinarily been staffed by Local No. 2 Union members." *Jam Prods.*, 893 F.3d at 1043. That is, the remand is not an open invitation for Jam to litigate any other allegedly objectionable conduct it now newly speculates might have occurred, nor to trawl endlessly through the Union's business records fishing for irregularities. The only issue on remand is whether, in April or May, the partially reinstated Jam employees received referrals for work to which they were not otherwise entitled, which they had not already been receiving after their mass termination from the Riviera, and/or which other similarly situated referral hall participants were not also receiving. Any effort by Jam to expand the scope of this matter on remand must be rejected by the Board.

CONCLUSION

For all the foregoing reasons, the Union urges the Board to adopt the sensible balance described above, remanding the case to the Regional Director to investigate the speculative, unsubstantiated claims made in Jam's offer of proof, and ordering a hearing if the offer of proof appears to have a sufficient basis in fact such that it does raise substantial and material factual issues that, if proven, would warrant setting aside the election.

Respectfully submitted,

/s/ David Huffman-Gottschling
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CERTIFICATE OF SERVICE

I, David Huffman-Gottschling, an attorney, certify that I caused a copy of the foregoing document to be served upon the following persons by email pursuant to Sections 102.5(f) of the Board's Rules and Regulations on October 16, 2018:

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